STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,	Supreme Court No.
Plaintiffs-Appellants,	Court of Appeals No: 251110
v.	Lower Court No. 01-007289-NH

MEMORIAL HOSPITAL, d/b/a/ MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C. AND SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellees.
_____/

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NOTICE OF HEARING

STATE BAR OF MICHIGAN'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

BRIEF AMICUS CURIAE OF THE STATE BAR OF MICHIGAN IN SUPPORT OF PLAINTIFFS-APPELLANTS' CROSS-APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Plaintiffs-Appellants,

v.

MEMORIAL HOSPITAL, d/b/a/ MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C. AND SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

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The State Bar of Michigan, by and through its attorneys, The Googasian Firm, P.C., for its motion for leave to file amicus curiae brief in this matter, states as follows:

1. The State Bar of Michigan, as established pursuant to MCL 600.901, is "a public body corporate the membership of which consists of all persons who are now and hereafter licensed to practice law in this state."

2. State Bar Rule 1 imposes upon the State Bar of Michigan a duty to aid in (1) "promoting improvements in the administration of justice and advancements in jurisprudence"; (2) "improving relations between the legal profession and the public"; and (3) "promoting the interests of the legal profession in this state."

3. The State Bar of Michigan seeks the Court's leave to file an amicus curiae brief in order to fulfill its obligations under Rule 1 to promote improvements in the administration of justice, the interests of the legal profession in this state, and more importantly, the protection of the public essential to maintaining good relations between the legal profession and the public.

4. The Court of Appeals decision on reconsideration impacts all three obligations imposed by the Michigan Supreme Court upon the State Bar of Michigan in Rule 1. The decision will have a significant and detrimental impact on the citizens of this state, relations between the legal profession and the public, and the administration of justice, and compels the submission of the accompanying amicus curiae brief.

5. The public and the members of the State Bar of Michigan have a common interest in recognizing out of state affidavits, ensuring that cases are decided on their merits, not on technicalities, and preventing the delay, added expense and waste that would result from the application of the Court of Appeals opinion.

WHEREFORE, the State Bar of Michigan respectfully requests that the Court grant its motion for leave to file amicus curiae brief, accept for filing the brief accompanying this motion, and order whatever other or further relief the Court deems just under the circumstances.

Respectfully submitted,

THE GOOGASIAN FIRM, P.C.

By_____

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Dated: August 18, 2005

STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

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v.

MEMORIAL HOSPITAL, d/b/a/ MEMORIAL HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C. AND SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

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BRIEF AMICUS CURIAE OF THE STATE BAR OF MICHIGAN IN SUPPORT OF PLAINTIFFS-APPELLANTS' CROSS-APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND INDICATING THE RELIEF SOUGHT

The State Bar of Michigan seeks leave to file an Amicus brief in support of Plaintiffs-Appellants' Cross Application for Leave To Appeal the Court of Appeals June 9, 2005 decision in this matter. A copy of the June 9, 2005 majority opinion is attached at Tab 3, and Judge Cavanagh's dissent at Tab 4. The majority opinion holds that an out of state affidavit is invalid because it was not certified by the clerk of the court of the county in which it was notarized, a holding inconsistent with the plain language of Michigan's Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261, et seq.

Amicus Curiae asks the Court to grant leave to appeal to consider and reverse the Court of Appeals decision in this case or, in the alternative, to summarily reverse that decision and hold that the URAA – not MCL 600.2102 – controls and further that all out of state affidavits notarized in compliance with the URAA are valid.

STATEMENT OF QUESTIONS INVOLVED

I. SHOULD THE COURT GRANT LEAVE TO CONSIDER WHETHER THE COURT OF APPEALS ERRED IN FAILING TO READ STATUTES HARMONIOUSLY WHERE ITS READING EFFECTIVELY NEGATES THE PLAIN LANGUAGE OF THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT (URAA), MCL 565.261, *et seq,* AND DEFEATS THE PURPOSE AND INTENT OF THE URAA?

Amicus Curiae says "Yes."

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

II. SHOULD THE COURT GRANT LEAVE TO CONSIDER WHETHER THE COURT OF APPEALS ERRED IN APPLYING THE WRONG RULE OF STATUTORY CONSTRUCTION WHERE THE RULE IT FOLLOWED – THAT THE SPECIFIC STATUTE GOVERNS OVER THE GENERAL STATUTE – DEFEATS BOTH THE PURPOSE AND INTENT OF THE URAA?

Amicus Curiae says "Yes."

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

III. SHOULD THE COURT GRANT LEAVE TO EXAMINE WHETHER THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE REQUIREMENT OF MCL 565.269 THAT THE URAA BE APPLIED UNIFORMLY AMONG THE STATES ENACTING IT WHEN THE COURT'S DECISION IS AT ODDS WITH THE DECISIONS OF OTHER STATES ADOPTING THE URAA?

Amicus Curiae says "Yes."

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

INTRODUCTION

In 1969, the Michigan Legislature enacted the Uniform Recognition of Acknowledgments Act (URAA), MCL 565.261, *et seq*, whose express purpose was "to establish the recognition to be given in this state to . . . notarial acts outside this state." The URAA was intended to modernize Michigan's law and to make uniform among the states the law on recognition of notarized documents, and "provides that whenever the laws of Michigan require an act of acknowledgment to be performed and whenever they authorize a notary public of Michigan to perform the act, then the officers designated in the Uniform Act [including notaries public from other states] may perform that act and it is to be recognized in Michigan." *See* Tab 6, p. 64. Under the URAA, an affidavit notarized outside Michigan is valid and is to be recognized without further proof of the notary's authority if it is properly notarized in the state in which it is signed. MCL 565.262-263. In an opinion issued for publication on June 9, 2005, the Court of Appeals ruled on reconsideration that an affidavit properly notarized in another state and valid under the URAA was not valid because the affidavit did not comply with a requirement the panel found to exist under MCL 600.2102, a statute enacted in 1879, that further proof of an out of state notary's authority – in the form of certification by the clerk of the local court in the county in which it was notarized – was required before an affidavit could be read in court. In reaching this decision, the Court of Appeals failed to follow the plain language of the URAA or to consider that the purpose of the URAA was to update Michigan's law governing the recognition of out of state affidavits.

The Court should grant leave to consider the significant questions raised and problems created by the Court of Appeals decision. The decision of the Court of Appeals brings into substantial question the viability and efficacy of a legislative act, the URAA. This case involves

legal principles of major significance to the state's jurisprudence. The decision is clearly erroneous and will continue to cause material injustice until it has been corrected.

STATEMENT OF INTEREST

Pursuant to MCL 600.901, the State Bar of Michigan is "a public body corporate the membership of which consists of all persons who are now and hereafter licensed to practice law in this state." State Bar Rule 1 provides:

> The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state.

Inherent in the State Bar of Michigan's duty to aid in improving relations between the legal profession and the public is the duty to aid in protecting the public from injustice. As Roberts P. Hudson, the first president of the State Bar of Michigan aptly explained, "No organization of lawyers can long survive which has not for its primary object the protection of the public." While all three obligations imposed by State Bar Rule 1 compel the submission of this amicus curiae brief, it is the State Bar of Michigan's duty to the public that is most directly affected by the Court's decision. The legal profession and the public have a common interest in ensuring that valid claims and defenses recognized by the laws of this state are heard on their merits, and that justice is not delayed or denied to the individuals, corporations, and others who seek their day in court on the basis of outdated technicalities. Relations between the legal profession and the public, and the public's perception of the courts of this state and the legal profession in general, will be compromised if the Court's opinion remains unaltered.

The vast majority of the members of the State Bar of Michigan who have supplied out of state affidavits have supplied uncertified affidavits in the belief that the plain language of the URAA would be given effect. The State Bar of Michigan submits this amicus curiae brief pursuant to the obligations imposed by State Bar Rule 1, to point out the error in the Court of Appeals opinion and the dramatic and damaging effect the ruling, if left uncorrected, will have on the administration of justice and the interests of the legal profession and, above all, on the public whose interests both the courts and the legal profession exist to serve.

STATEMENT OF FACTS

Amicus Curiae, the State Bar of Michigan, hereby incorporates the Statement of Facts and Proceedings contained in the brief filed in this Court on behalf of Plaintiffs-Appellants Sue H. Apsey and Robert Apsey, Jr.

PROCEDURAL BACKGROUND

1. The April 19, 2005 Opinion.

In its initial opinion below, issued on April 19, 2005, the Court of Appeals upheld a trial court's decision that MCL 600.2102 rendered an out of state affidavit invalid because the affidavit was not "certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court." A copy of this opinion is attached at Tab 1. The Court held that MCL 600.2102 and not the URAA controlled. The primary basis for this decision was the location of the statutes within separate chapters of the compiled laws:

> The Uniform Recognition of Acknowledgments Act appears among statutes governing conveyances of real property. The emphasis, then, is not on documents

> submitted to Michigan courts, but on documents that have potentially great significance in other contexts, e.g., memorializing agreements or recording conveyances and interests.

The Court then reasoned that the "more specific requirements of MCL 600.2102 . . . control over the general requirements of [the URAA]." The Court dismissed the case with prejudice as a consequence of its conclusion that the affidavit was a nullity, holding that the medical malpractice action had not been properly commenced within the statute of limitations.

2. The Court Vacates Its Opinion And Grants Reconsideration, Permitting Participation By Numerous Amici.

On June 2, 2005, the Court of Appeals entered an order granting reconsideration and vacating its April 19, 2005 opinion pending the release of an opinion on reconsideration. Tab 2. The court granted the motions of the State Bar of Michigan and several other interested organizations and entities, including the Michigan Trial Lawyers Association, United Auto Workers, State of Michigan Department of Community Health, State Bar of Michigan Negligence Section, State Bar of Michigan Elder Law Section, Michigan Defense Trial Counsel, and Michigan State Medical Society, to file amicus briefs all in support of reconsideration. *Id.*

3. The Opinions On Reconsideration.

a. The Majority Opinion.

On reconsideration, in an opinion issued for publication on June 9, 2005, a two-judge majority again concluded that MCL 600.2102 controlled and the affidavit was invalid, but for different reasons. A copy of the June 9, 2005 opinion is attached at Tab 3. The Court abandoned

the proposition that the placement of the statutes within the compiled laws controlled, but reasoned instead that the statutes could be "harmonized" by permitting MCL 600.2102 to control:

> The two statutes can be harmonized. The URAA provides in pertinent part, "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268. The Legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993); *Kalamazoo v KTS Industries Inc*, 263 Mich App 23, 34; 687 NW2d 319 (2004). MCL 600.2102 is a law of this state that requires more specific recognition requirements for notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings; i.e., it requires that the signature of a notary public on an affidavit taken out of state "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." As such, the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102. Furthermore, this harmonious application of the URAA and MCL 600.2102 avoids conflict.
>
> For these reasons, we find that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 565.262 of the URAA. In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification when the affidavit is to be read, meaning officially received and considered, by the judiciary. This special certification requirement of the MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. Instead, MCL 565.268 allows for the statutes to be harmonized. As such, the special certification is a necessary part of an affidavit submitted to the court to meet the requirement of MCL 600.2912d(1).

Id at 4-5. The majority went on to reverse its decision to apply the holding retroactively, finding that its decision was not clearly foreshadowed because of the existence of URAA. *Id* at 7.

b. The Dissent.

Judge Cavanagh dissented, concluding after reconsidering the matter that both statutes have as their object the recognition of notarial acts and should therefore be read together and without conflict, if possible. A copy of the dissent is attached at Tab 4. Judge Cavanagh found the

majority's interpretation "misguided" and would hold that the statutes could be read together by giving effect to the URAA's language providing an *additional* means of proving notarial acts:

> MCL 600.2102 and the URAA, particularly MCL 565.263 are harmonious and should be read in pari materia. Both statutes relate to authentication and have the same general purpose – to verify the authenticity of notarial acts, including those involving affidavits. See *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell Telephone Co,* 374 Mich 543, 558; 132 NW2d 660 (1965).
>
> The statute in dispute, MCL 600.2102, provides a method of authenticating notarial acts, i.e., of proving that a notary public actually notarized the document. MCL 600.2102(4) states that "[t]he signature of such notary public . . and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public . . . shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court." MCL 600.2102 has been in its present form since 1879 and, until the URAA was enacted in 1969, appears to have been the only means of proving notarial acts.
>
> The URAA, however, explicitly states that it is "an additional method of proving notarial acts." MCL 565.268. And, MCL 565.263(4) provides that the signature and title of the notary public are prima facie evidence that he or she is a notary public and that his or her signature is genuine. That is, it is another method of proving that a notary public actually notarized the document and it does not require a clerk of a court to perform the authenticating function. The majority's reliance on and interpretation of the sentence "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state," found in MCL 565.268 is misguided. The key phrase in that sentence is "the recognition accorded to notarial acts." Reasonably interpreted, the sentence does not eviscerate the effect of the URAA or buttress the applicability of MCL 600.2102. That is, rather than decreasing or limiting the recognition accorded to notarial acts, the URAA broadens the recognition accorded to notarial acts.

Id at 1-2. Accordingly, Judge Cavanagh would have held that the URAA controlled.

ARGUMENT

I. The Court of Appeals Erred In Failing To Apply The URAA And This Court Should Grant Leave To Correct This Error Involving Legal Principles Of Major Significance To The State's Jurisprudence.

Summary of Argument

The Court should grant leave to correct the error of the Court of Appeals in holding that the affidavit at issue was not valid. This issue is squarely controlled by the URAA, and the Court of Appeals erred in applying MCL 600.2102 instead of the URAA in determining whether the affidavit was proper. The majority erred in concluding that it could harmonize these two statutes by ruling that an affidavit valid under the URAA should be excluded by the application of MCL 600.2102. In reading the statutes in this manner the majority failed to consider that the purpose and intent of the Legislature in enacting the URAA was to modernize Michigan law, including outdated statutes like MCL 600.2102, and to bring the law in Michigan into uniformity with that of the other states. The Court of Appeals decision has had the opposite effect, by reviving an antiquated authentication requirement adopted ninety years before the URAA. The decision does not place the statutes in harmony with each other, but in discord by failing to apply the plain language of the URAA. As a result, Michigan's law is unique and differs from the laws of the other states having adopted the URAA, exactly the opposite of the uniformity the URAA expressly requires. When the background of the URAA and the reasons for its adoption are considered, and the plain language of the statute applied, the error of the Court of Appeals becomes clear.

A. The Court Of Appeals Reading Is Not Harmonious, And The Court Of Appeals Erred In Failing To Consider That Its Decision Defeats The Purpose And Intent Of The URAA.

The Court should grant leave to correct the Court of Appeals erroneous conclusion that the application of MCL 600.2102 to nullify affidavits made valid by the plain language of the URAA constituted a harmonious reading of these statutes. In reaching this conclusion, the Court of Appeals majority failed to consider the purpose of the URAA which, as outlined below, was to modernize Michigan's law by providing an additional means of validating out of state affidavits and other notarized documents and to create uniformity among the laws of the states.

1. The Purpose Of The URAA Is To Modernize Michigan's Law And To Bring It Into Uniformity With That Of The Other States By Providing For Recognition Of Out Of State Affidavits And Other Documents.

a. The National Conference Of Commissioners On Uniform State Laws Adopts The URAA For The Purpose Of Making Uniform The Laws Of The States To Recognize Out Of State Affidavits And Other Notarized Documents.

The URAA was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved by the NCCUSL and the ABA in 1968. A copy of the URAA as proposed by the NCCUSL is attached at Tab 5. In its prefatory note to the URAA, the NCCUSL explained the reasons for the act's proposal:

> Reasons for Proposed Uniform Act. Since its first Uniform Acknowledgment Act in 1892, the National Conference has promulgated, amended and revised acts in 1914, 1939, 1942, 1949, and 1960. Each of these acts had a multiple purpose: to establish a simplified and certain form for taking acknowledgments both within and without the state; and to specify how acknowledgments and other notarial acts taken out of the state could be taken so as to be recognized in the enacting state.
>
> * * *
>
> Rather than preparing another "minor amendment" which wastes time of state legislatures, it is proposed in this draft that there be a major independent act

concerning recognition in the enacting state of acknowledgments and other notarial acts performed elsewhere for use in the enacting state. . . .

This act does not require amendment of existing acknowledgment law in the state unless the state chooses to make an amendment. This act deals only with "recognition of notarial acts" and it is a recognition statute "in addition to any other recognition statute now in effect in the state." While as a matter of tidying-up the statute books it may be desirable to repeal some of the existing recognition statutes such as the earlier uniform acknowledgment acts, this is not necessary. This act may stand alone.

Need for Uniformity. The major need for uniformity is the need of notaries and persons outside the enacting state who have been asked to notarize a document for use in the enacting state. . . . All this act does is to provide that whenever the laws of the enacting state require an act of acknowledgment to be performed and whenever they authorize a notary public of the enacting state to perform the act, then the officers designated in the proposed Act may perform the act and it is to be recognized in the enacting state.

Id at i-ii.[1]

b. Pursuant To Its Statutory Mandate To Examine Michigan's Laws and To Recommend Changes In the Law In Order To Bring The Law Into Harmony With Modern Conditions, The Michigan Law Revision Commission Proposed The URAA For Enactment.

The URAA was proposed for enactment by the Michigan Law Revision Commission (the "Commission"), whose statutory purpose is, among other things, to review Michigan's statutes and propose laws that modernize Michigan's law and eliminate outdated laws. The Commission was created by MCL 4.1401. The Commission's statutory purpose is to examine the law in Michigan and other states and to discover defects and anachronisms in the law and to recommend the necessary

[1] When Michigan law is based upon a uniform act, Michigan courts do not hesitate to consult the act, including comment and prefatory notes, to determine how the act should be applied as adopted in Michigan. *See,* e.g., *Electrolines, Inc v Prudential Assurance Company*, 260 Mich App 144,153; 677 NW2d 874 (2004); *Compton v Lepak*, 154 Mich App 360, 365-366; 347 NW2d 311 (1987); and *People v Riddle*, 65 Mich App 433, 438-439; 237 NW2d 491 (1976); *MDOT v Thrasher*, 446 Mich 61; 521 NW2d 214 (1994).

reforms. MCL 4.1403(1)(a). The Commission is expressly instructed to "[r]eceive and consider proposed changes in the law recommended by . . . the national conference of commissioners on uniform state laws[.] MCL 4.1403(1)(b). The Commission is charged to "[r]ecommend changes in the law it considers necessary in order to modify or eliminate antiquated and inequitable rules of law, and bring the law of this state into harmony with modern conditions. Where advisable, the Commission is to submit proposed bills to implement its recommendations." MCL 4.1403(1)(g).

In fulfilling these statutory obligations, the Commission in 1968 submitted to the Legislature "Recommendations Relating to Recognition of Acknowledgments." Tab 6, Michigan Law Revision Commission, 3rd Annual Report, p. 64. As the Commission explained, by 1968 the mobility of the population and the resulting need for recognition in one jurisdiction of documents notarized in another jurisdiction had made it imperative that the states recognize documents from other jurisdictions:

> A comprehensive statute on the subject of recognition of acknowledgments is becoming increasingly imperative as more and more citizens of the United States are employed away from their domiciliary states by American industry and the federal government, including the armed services. . . . Therefore the National Conference of Commissioners on Uniform State Laws has prepared a Uniform Recognition of Acknowledgments Act which the Law Revision Commission recommends be adopted in Michigan. The enactment of the Uniform Act would substantially aid the citizens and residents of Michigan whenever they must conduct business outside the state of Michigan.
>
> * * *
>
> **The Uniform Recognition of Acknowledgments Act is an act governing recognition in the enacting state of acknowledgments and other notarial acts performed elsewhere for use in the enacting state. The act describes the persons whose notarial acts will be recognized in the enacting state.** The act does not specify what instruments must be acknowledged or when proof of execution of an instrument is required. **This act provides that whenever the laws of Michigan require an act of acknowledgment to be performed and whenever they authorize a notary public of Michigan to perform the act, then the officers designated in the Uniform Act may perform that act and it is to be recognized in Michigan.**

> The Uniform Act lists the officers whose performance of notarial acts will be recognized in Michigan . . . .
>
> **The act does not require the amendment or repeal of any existing legislation in Michigan[.]**

Id (emphasis added).

c. The Michigan Legislature Adopts The URAA With The Express Purpose And Intent Of Recognizing Out Of State Affidavits And Other Documents.

In keeping with the reasoning behind the act as set forth in the prefatory note from the NCCUSL and the Commission, the Michigan Legislature in adopting the URAA expressly stated that the Act's purpose was "*to establish the recognition to be given in this state to acknowledgments and notarial acts outside this state*[.]" MCL 565.261(emphasis added). Consistent with its express purpose to recognize affidavits and other documents notarized outside of Michigan, the Legislature enacted MCL 565.262, a provision providing in explicit and plain language that documents notarized outside the state of Michigan are to be given the same effect as documents notarized within the state:

> "Notarial acts" means acts that the laws of this state authorize notaries public of this state to perform . . . . Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by . . . A notary public authorized to perform notarial acts in the place in which the act is performed.

Id. As the majority correctly held, the affidavit at issue in this case is valid under the URAA.

The URAA also makes clear by reference to "proof of authority" and "prima facie evidence" that the "recognition" to be given to notarial acts includes being read and admitted in a court of law:

> If the notarial act is performed by any of the persons described in subdivisions (a) to (d) [expressly including notaries], the signature, rank, or title, and serial number, if any, of the person are sufficient proof of the authority of the holder of that rank or title to perform that act. *Further proof of authority is not required.*

MCL 565.263(1)(emphasis added). "The signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine." MCL 565.263(4).

2. The Court Of Appeals Opinion Ignores The Purpose And Plain Language Of The URAA.

The Court of Appeals opinion does not harmonize the statutes because it ignores and defeats the purpose and intent of the Legislature in adopting the URAA. "The paramount rule of statutory interpretation is to give effect to the intent of the Legislature. We begin with the language of the statute itself, and also consider the context in which the statute is used." *LeRoux v Secretary of State*, 465 Mich 594, 616-617; 640 NW2d 849 (2002)(citations omitted). Here, the overarching purpose and intent of the URAA as expressed by the NCCUSL, the Commission, and the Legislature was to modernize Michigan's law by providing for the recognition of notarial acts performed outside Michigan. The express purpose of the URAA is "to establish the recognition to be given in this state to . . . notarial acts outside this state." MCL 565.261. The URAA expressly provides that affidavits and other documents notarized properly outside the state may be used in Michigan "with the same effect as if performed by a notary public of this state." MCL 565.262. By refusing to give recognition to notarial acts outside this state, the decision of the Court of Appeals defeats the main purpose of the URAA because it returns Michigan to exactly the type of antiquated law the Legislature intended the URAA to update. The opinion nullifies the plain language in the URAA which gives *all* properly notarized out of state affidavits the same effect as if they had been notarized here in Michigan.

In enacting the URAA, the Legislature is charged with knowledge of MCL 600.2102 and all other laws on the subject, as well as the effect of new enactments on those existing laws. *Walen v*

Dep't of Corrections, 443 Mich 240, 248 (1993). Had the Legislature intended to exclude from the URAA's broad language recognition of affidavits to be read in courts, it would have done so. *See State Treasurer v Schuster*, 456 Mich 408, 418 (1998). But the Legislature did not exclude from its application documents that are to be read in a Michigan court, and the Act's plain language permits no such exception. *See, id.* Presented with a proposed act that **"provides that whenever the laws of Michigan require an act of acknowledgment to be performed and whenever they authorize a notary public of Michigan to perform the act, then the officers designated in the Uniform Act may perform that act and it is to be recognized in Michigan,"** the Legislature adopted the act without modification. Tab 6, p. 64. (emphasis added)

What the Legislature did, then, instead of creating an exception to the recognition provided by the URAA for documents to be read in court, was to provide explicit instruction to Michigan's courts that "[t]he signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine" and, if the affidavit is notarized by a notary, "[f]urther proof of authority is not required." MCL 565.263. The majority's decision effectively negates these provisions of the URAA by requiring "further proof of authority" in the form of certification by the clerk of the court in the county in which the affidavit was notarized.

3. The Court Of Appeals Erred In Failing To Consider And Apply The Plain Language Of The URAA, Taking The Statutory Language Out Of Context.

The Court of Appeals error appears to arise in part from a misreading of the language in the URAA that "Nothing in [the URAA] diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." The majority held:

> The two statutes can be harmonized. The URAA provides in pertinent part, "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state." MCL 565.268. . . . MCL 600.2102 is a law of this state that requires more specific recognition requirements for notarial acts authenticating an affidavit of a person residing in another state that is received in judicial proceedings; i.e., it requires that the signature of a notary public on an affidavit taken out of state "be certified by the clerk of any court of record in the county where such affidavit shall be taken, under seal of said court." As such, the URAA, enacted after MCL 600.2102, does not diminish or invalidate the more specific and more formal requirements of MCL 600.2102. Furthermore, this harmonious application of the URAA and MCL 600.2102 avoids conflict.

Tab 3, pp. 4-5. But the majority only quoted a portion of the section from which the recognition language was taken and in doing so, took the language out of context. The pertinent portion of the URAA, in its entirety, reads:

> A notarial act performed prior to the effective date of this act is not affected by this act. **This Act provides an additional method of proving notarial acts.** Nothing in the act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.

MCL 565.268 (emphasis added). The majority reads the last sentence of this section to create an exception to the general rule of recognition set forth by the URAA and in doing so gets the issue exactly backwards. This language was not intended to permit a narrowing of the recognition provided by the URAA, or to create an exception for documents to be read in court, but instead was intended to permit the continued recognition provided by other, existing statutes and to provide a new means of recognition for all properly notarized out of state affidavits. The meaning of this

sentence becomes clear when the preceding sentences, omitted from the majority opinion, are considered.

4. The Court Should Adopt The Reasoning Of The Dissent.

The Court should adopt the reasoning of Judge Cavanagh's dissent. As Judge Cavanagh correctly concluded, "Reasonably interpreted, the sentence does not eviscerate the effect of the URAA or buttress the applicability of MCL 600.2102. That is, rather than decreasing or limiting the recognition accorded to notarial acts, the URAA broadens the recognition accorded to notarial acts." As both the NCCUSL and the Commission explained in their respective prefatory notes, the URAA does not require the repeal of existing legislation relating to notarial authority and recognition because its essential purpose is to add another simplified and uniform method of proving notarial acts without removing any prior means or invalidating any document already notarized by a method permissible under prior or existing law. Tab 5 at pp. i-ii, Tab 6 at pp. 64-65.

II. The Court Should Grant Leave To Correct The Court of Appeals Erroneous Application Of Rules Of Statutory Construction.

A. The Court of Appeals Erred In Concluding That The More Specific Statute Controlled Without Considering The Background, Purpose, Intent Or Context Of The URAA.

As outlined above, MCL 600.2102 and the URAA can be harmonized, but only by applying the language of the URAA. If, however, a conflict exists between the two statutes that could not be resolved by giving effect to the plain language of the URAA recognizing properly notarized out of state affidavits without exception, that conflict cannot properly be resolved by rote application of the general/specific distinction relied upon by the Court of Appeals. The Court of Appeals appears to have based its decision that MCL 600.2102 controlled upon a determination that the more general

URAA must yield to the more specific MCL 600.2102. Tab 3, p. 4. In doing so, the majority cited to *State Treasurer v Schuster*, 456 Mich 408 (1998), but failed to follow *Schuster*'s teaching.

In *Schuster*, the Court determined that a conflict existed between two acts, the Public School Employees Retirement Act, MCL 38.1301, *et seq*, which protects the pensions of public school employees from creditors, and the State Correctional Facility Reimbursement Act, MCL 800.401, *et seq*, which deems pension benefits a source of reimbursement to the state for incarceration expenses. In deciding which statute would control, the Court emphasized that the rule of applying the more specific statute should not be followed where it would defeat the purpose of one statute:

> [T]his Court has refused to apply rules that the more specific statute controls where such "strict construction . . . would defeat the main purpose of other statutes relating to the same subject." *In this case, we refuse to adopt the Court of Appeals construction of the statutory provisions at issue because it effectively nullifies the express language in the reimbursement act and, consequently, defeats the main purpose of that statute.*

Schuster, at 417-418.

Here, as in *Schuster*, permitting MCL 600.2102 to control defeats the legislative intent of the overarching URAA. The URAA gives *all* properly notarized out of state affidavits the same effect as if they had been notarized here in Michigan. MCL 565.262. Because the decision of the Court of Appeals in this case allows MCL 600.2102 to control over the URAA, it suffers from the same fatal flaw as the Court of Appeals decision in *Schuster* that this Court reversed: it nullifies the express language in the URAA and defeats its main purpose.

B. Even If A Conflict Existed, The Court of Appeals Erred In Applying The Wrong Rule Of Statutory Construction And Should Have Concluded That URAA Controls Because It Is The More Recent Enactment.

Even if a conflict existed between the statutes at issue here, and the conflict was one that could only be resolved by the application of a rule of statutory construction, the Court of Appeals

erred in failing to apply the rule that the more recent enactment controls. When two statutes are in conflict, the later statute controls "as the more recent expression of legislative intention." *Center Line v 37th District Judges*, 403 Mich 595, 607; 271 NW2d 526 (1978). The interaction between MCL 600.2102 and the URAA appears to be the classic situation where the later-adopted statute should control. The URAA was enacted in 1969, ninety years after MCL 600.2102 and with the express purpose of modernizing Michigan's law, precisely because the existing laws on recognition needed updating and Michigan needed to be brought into the modern era and out of the 19th century. In such a situation, the later statute should control.

III. The Court Of Appeals Decision Violates MCL 565.269 Which Requires That The URAA Be Interpreted Uniformly With Other States Having Enacted It.

The Court should grant leave to consider whether the Court of Appeals erred in failing to consider the uniformity required by the URAA. As a general matter, when Michigan law is based upon a uniform act, Michigan courts do not hesitate to consult the act, including comment and prefatory notes, to determine how the act should be applied as adopted in Michigan. *See,* e.g., *Electrolines, Inc v Prudential Assurance Company*, 260 Mich App 144,153 (2004)(consulting prefatory note to uniform law); *Compton v Lepak*, 154 Mich App 360, 365-366 (1987)(examining prefatory note and comments of Uniform State Antitrust Act in interpreting Michigan Antitrust Reform Act modeled after it); *People v Riddle*, 65 Mich App 433, 438-439 (1976)(using language of Uniform Controlled Substances Act to determine "intent of the Legislature" of language in Michigan Controlled Substances Act); *MDOT v Thrasher*, 446 Mich 61 (1994) (extensively examining the Uniform Comparative Fault Act and holding that the uniform act would provide "insight" into the workings of Michigan's comparative fault act which was loosely based on the

uniform act). Uniformity is particularly important in the case of the URAA, a consideration not reached by the Court of Appeals.

In reaching its decision that the out of state affidavit at issue was not valid, the panel erred in failing to consider that the Legislature intended and instructed that the URAA *shall* be interpreted uniformly among the states adopting it: "This act *shall* be so interpreted as to make uniform the laws of those states which enact it." MCL 565.269. The Legislature's use of the word "shall" indicates that it is mandatory, not discretionary. *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 485; 679 NW2d 98 (2004)("Courts must give the ordinary accepted meaning to the mandatory word 'shall' . . . unless to do so would frustrate the legislative intent.") The Court of Appeals failed to cite or consider this provision in its opinion, just as it failed to cite or consider the rulings in other state's courts on this issue.

The majority's holding that affidavits valid under the URAA may *not* be read in a Michigan court violates the uniformity provision because other states adopting the URAA have uniformly and correctly determined that the URAA permits all properly notarized affidavits to be read in court. Illinois, like Michigan, enacted the URAA and the Act was placed within its real property chapter. *See* 765 ILCS 30/2 (West 1994). Illinois courts have correctly held that the URAA applied to validate an out of state affidavit even where the Illinois election code required the affidavit to be from an Illinois notary. *See, e.g., Frost v County Officers Electoral Board*, 245 Ill App 3d 286; 673 NE2d 443 (IL App 1996)(URAA affidavit taken and notarized in District of Columbia read and given effect in Illinois court). South Carolina, too, has adopted the URAA and the South Carolina Court of Appeals has held that a foreign affidavit was valid and admissible in court as an acknowledged document. *See, e.g., Lister v Nationsbank*, 329 SC 133; 494 SE2d 449, 453 (SC App 1998)(URAA permits reading in Court of affidavit notarized in Aruba). Colorado recognizes that

the plain language of the URAA validates out of state affidavits. *See Otani v District Court*, 662 P2d 1088, 1090-91 (Colo S Ct 1983)(out of state affidavit valid under URAA "notarial acts performed by authorized notaries outside of Colorado have the same effect as if performed within the state by a Colorado notary"). Arizona, too, recognizes that out of state affidavits are valid under the URAA. *See Valley Nat'l Bank of Arizona v AVCO Development Co*, 14 Ariz App 56; 480 P2d 671 (Ariz Ct App 1971). The Court of Appeals decision is at odds with the decisions of the other states having adopted the URAA and consequently, is in violation of MCL 565.269.

IV. The Court Should Grant Leave To Correct The Court of Appeals Decision And The Havoc, Expense And Waste It Continues To Cause.

The Court should grant leave here to correct the decision of the Court of Appeals and to ameliorate the havoc, expense and waste the decision continues to cause. Certification of affidavits from other states is an outdated and unnecessary exercise in 2005, just as it was in 1969 when the Legislature recognized as much in adopting the URAA. Here, there is no dispute that the notary had the authority to notarize the affidavit of merit. Nor is there any claim that the affidavit at issue is a fraud or a forgery, which appears to be the purpose of requiring notarization. A ruling that the affidavit is not valid, despite the fact that the substance or veracity of the affidavit is not challenged, truly elevates form over substance.

Lawyers and their clients, including individuals, businesses, and public entities, plaintiff and defendant alike, have for decades relied upon the plain language of the URAA. They have operated under and relied upon the legally valid premise that an affidavit duly notarized outside the state will be given the same effect as an affidavit notarized within Michigan, including within its courts, as the URAA expressly provides. The Court's decision that affidavits valid under the plain language of

the URAA are not entitled to be given the same effect as those notarized in this state came as a stunning surprise not only to those involved in litigating medical malpractice cases, but to lawyers engaged in numerous practices. And, while the majority stated that its holding was limited to affidavits of merit in medical malpractice cases, the opinion will have broader application because it arguably applies to all affidavits to be read in any Michigan court. The Court of Appeals decision is equally troubling for corporations and individuals, for plaintiffs and defendants, for doctors and patients, and for governmental entities and citizens, all of whom must now go to the unnecessary expense of obtaining additional certification. Those who have filed affidavits that comply with MCL 565.262 must now go through the pointless exercise of having their documents certified, and future affidavits authenticated, which wastes both time and money.[2]

The Court of Appeals decision can only harm both relations between the legal profession and the public, and the public's confidence in the legal profession and the courts, which are essential to the proper functioning of our system of justice.

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[2]This exercise may not only be pointless, expensive, and unnecessary: it may be impossible as well. Certification by the local court clerk, which appears to be what the Court of Appeals majority requires, may simply be unavailable in some states. The modern trend is, as in Michigan, to take the governance of notaries public out of the local level and centralize it in the Secretary of State's office. See MCL 55.261, *et seq*. In Florida, for example, local court clerks no longer certify affidavits because the Florida Legislature transferred this authority to the Florida Secretary of State. FL Stat Ann 117.103. This appears to be the case in a number of other states as well. Consequently, while at first glance the majority's decision to reverse itself and to apply prospectively its certification requirement may seem to avoid the immediate injustice caused by panel's original decision, it does not. This is because the Court of Appeals decision carries the potential of leaving citizens and litigants in those states where certification by the local court clerk is unavailable, as well as litigants in Michigan needing affidavits from those states, with an apparent inability to obtain an affidavit that may be "read" in a Michigan court. Can it be that no affidavit from Florida or any other state where certification is no longer performed by a local court clerk can be read in a Michigan court?

RELIEF REQUESTED

For these and other reasons argued by Plaintiffs-Appellants in their application for leave, Amicus Curiae the State Bar of Michigan urges the Court to permit the filing of this brief, grant Plaintiffs-Appellants' Application for Leave to Appeal, or in the alternative, to summarily reverse the Court of Appeals' decision and hold the affidavit, and all properly notarized out of state affidavits, valid under the URAA.

Respectfully submitted,

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Dated: August 18, 2005